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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1970
No. 204

JAMES EDWARD CRAMPTON,
Petitioner,

—vs—

THE STATE OF OHIO,
Respondent.

On Writ of Certiorari to the Supreme Court
of the State of Ohio

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
SUMMARY OF ARGUMENT	2
ARGUMENT:	
I. THE OHIO STATUTE WHICH PROVIDES THAT THE TRIER OF FACT SHALL DETERMINE BOTH GUILT AND PUNISHMENT IN A SINGLE VERDICT IN CASES OF MURDER IN THE FIRST DEGREE IS NOT VIOLATIVE OF PETITIONER'S RIGHT TO BE FREE FROM SELF-INCRIMINATION	4
A. Applicable Ohio Statutory and Case Law Concerning The Recommendation of Mercy By The Trier of the Facts in a Capital Case	5
B. The Unitary Trial Procedure In A Capital Case Where The Trier of The Facts Determines Both Guilt and Punishment is Fundamentally Fair Under the Due Process Clause and Does Not Violate An Accused's Fifth Amendment Protection Against Self-Incrimination	13
II. THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DO NOT REQUIRE STATUTORY STANDARDS FOR THE IMPOSITION OF THE DEATH PENALTY BY THE JURY IN A CAPITAL CASE	29
CONCLUSION	47, 48

TABLE OF AUTHORITIES

Cases:	Page
Ashbrook v. State, 49 Ohio App. 298, 197 N.E. 214 (1935)	11
Application of Rodriguez, 226 F. Supp. 799 (D.N.J.1964)	23
Behrens v. United States, 312 F. 2d 223 (7th Cir.1962)	23
Calloway v. United States, 399 F. 2d 1006 (D.C. Cir. 1968)	19
Coble v. State, 31 Ohio St. 100 (1876)	10
Coleman v. United States, 334 F. 2d 558 (D.C. Cir. 1964)	22
Couch v. United States, 235 F. 2d 519 (D.C. Cir. 1956)	24
Chatterton v. Dutton, 223 Ga. 243, 154 S.E. 2d 213 (1967)	38
Duncan v. Louisiana, 391 U.S. 145 (1968)	46
Frady v. United States, 348 F. 2d 84 (D.C. Cir. 1964)	27
Giaccio v. Pennsylvania, 382 U.S. 399 (1966)	3, 37, 39
Green v. United States, 313 F. 2d 6 (1st Cir. 1963)	23, 24
Hill v. United States, 368 U.S. 424 (1962)	2, 20
Howell v. State, 102 Ohio St. 411, 131 N.E. 706 (1921)	7, 11, 12, 40
In re Anderson, 69 Cal. 2d 613, 447 P. 2d 117 (1968)	44
In re Ernst Petition, 294 F. 2d 556 (3rd Cir. 1961)	38

Cases continued

Jackson v. Denno, 378 U.S. 368 (1964) 19, 20

Johnson v. Commonwealth, 158 S.E. 2d. 725 (1968) 27

Keveny v. State, 109 Ohio St. 64, 141 N.E. 845 (1923) 10

Knapp v. Thomas, 39 Ohio St. 377, 48 Am. Rep. 462 (1883) 34

Licavoli v. State, 20 O.O. 562, 34 N.E. 2d 450 (1935) 33

Massa v. State, 37 Ohio App. 532, 175 N.E. 219 (1930) 7

Maxwell v. Bishop, 398 U.S. 262 (1970) 13

Michelson v. United States, 335 U.S. 469 (1948) 28

McGrady v. Cunningham, 296 F. 2d 600 (4th Cir. 1961) 23, 24

Myers v. Frye, 401 F. 2d 18 (7th Cir. 1968) 20

Oyler v. Boles, 368 U.S. 448 (1962) 36

Pope v. United States, 372 F. 2d 710 (8th Cir. 1967) 27

Salsby v. State, 119 Ohio St. 314, 164 N.E. 232 (1928) 26

Segura v. Patterson, 402 F. 2d 249 (10th Cir. 1968) 3, 15, 20, 47

Shelton v. State, 102 Ohio St. 376, 131 N.E. 733 (1921) 11, 12

Skinner v. Oklahoma, 316 U.S. 535 (1942) 3, 21, 33, 35

Specht v. Patterson, 386 U.S. 605 (1967) 21

Spencer v. Texas, 385 U.S. 554 (1967) 2, 3, 14, 17, 19, 20, 26, 28, 38, 39, 45

Cases continued

Snyder v. Massachusetts, 291 U.S. 97 (1934) 27

State v. Ausberry, 83 Ohio App. 514, 82 N.E. 2d 751 (1947) 26

State v. Caldwell, 135 Ohio St. 424, 21 N.E. 2d 343 (1939) 4, 12, 40

State v. Chapman, 111 Ohio App. 441, 168 N.E. 2d 14 (1959) 9-10

State v. Cocco, 73 Ohio App. 182, 55 N.E. 2d 430 (1943) 9

State v. Crafton, 15 Ohio App. 2d 160, 239 N.E. 2d 571 (1968) 9

State v. Crampton, 18 Ohio St. 182, 248 N.E. 2d 614 (1969) 11, 38

State v. Ellis, 98 Ohio St. 390, 120 N.E. 2d 218 (1918) 11

State v. Frohner, 150 Ohio St. 53, 80 N.E. 2d 868 (1948) 13

State v. Hector, 19 Ohio St. 2d 167, 249 N.E. 2d 912 (1969) 10

State v. Hickman, 102 Ohio App. 78, 141 N.E. 2d 202 (1956) 9

State v. Lucas, 93 Ohio App. 281, 109 N.E. 39 (1952) 13

State v. Moore, 149 Ohio St. 226, 78 N.E. 2d 365 (1948) 9

State v. Mount, 30 N.J. 195, 152 A. 2d 343 (1959) 27

Cases continued

State v. Murdock, 172 Ohio St. 221, 174 N.E. 2d 543 (1961) 10

State v. Strong, 119 Ohio App. 31, 196 N.E. 2d 801 (1963) 9

Trop v. Dulles, 356 U.S. 86 (1958) 45

United States v. Allegrucci, 299 F. 2d 811 (3rd Cir. 1962) 23

United States v. Behrens, 375 U.S. 162 (1963) 23

United States, ex rel Darrah v. Brierly, 290 F. Supp. 960 (E.D.Pa. 1968) 23

United States v. Curry, 358 F. 2d 904 (2nd Cir. 1966) 27

United States ex rel Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966) 23

United States v. Jackson, 390 U.S. 570 (1968) 19

United States v. Johnson, 315 F. 2d 714 (2nd Cir. 1963) 23

United States ex rel Thompson v. Price, 258 F. 2d 918 3rd Cir. (1958) 27

Williams v. Florida, 399 U.S. 78 (1970) 3, 4, 18, 19, 38, 45, 46

Williams v. New York, 337 U.S. 241 (1949) 2, 20, 21

Winston v. United States, 172 U.S. 510 (1899) 39

Witherspoon v. United States, 391 U.S. 510 (1968) 4, 7, 38, 44, 45, 46, 47

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 21, 35, 36

Statutes:

Alaska Stat., §11.15.010; §11.15.020 45

Conn. Gen. Stat., §53-10 42

Ga. Code Ann., §26-1101 42

Ga. Laws, No. 1333 (1970) 42

Iowa Code Ann., §690.2 45

Maine Rev. Stat. Ann., title 17, §2651 45

Mich. Comp. Laws, §750.316 45

Minn. Stat. Ann., §609.185 45

N.Y. Penal Laws, §1253.0 and §125.35 42

Ohio Constitution, Article III, Section 11 33

93 Ohio Laws 223 6

Ohio Revised Code, §2901.01 ..... 6, 30, 31, 42

Ohio Revised Code, §2901.02 30

Ohio Revised Code, §2901.03 30

Ohio Revised Code, §2901.04 30

Ohio Revised Code, §2901.27 30

Ohio Revised Code, §2901.28 30

Ohio Revised Code, §2945.06 5

Statutes continued

Ohio Revised Code, §2945.25 7

Ohio Revised Code, §2945.42 10

Ohio Revised Code, §2945.56 8

Ohio Revised Code, §2945.57 8

Ohio Revised Code, §2945.59 ..... 9, 26

Ohio Revised Code, §2947.05 24

Ohio Revised Code, §2947.06 25

Ohio Revised Code, §2951.02 25

Ohio Revised Code, §2965.13 34

Ohio Revised Code, §2965.14 34

Oregon Rev. Stat., §163.010 45

Texas Code Crim. P. Ann., Art. 37.07 (2) (b) 42

West Va. Code, §61-2-2 45

Wisconsin Stat. Ann., §940.01 45

Other Authorities

American Law Institute, Model Penal Code 41, 42, 43

Bedau, Death Penalty in America, 27 (rev. ed., 1967) 30

Black's Law Dictionary, 4th Ed 31

Comment, The Death Penalty Cases, 56 Cal. L. Rev. 1268 (1968) 4, 44

Elman, Of Law and Men, (1956) 18

Kalvin & Zeisel, The American Jury (1966) 17

State of Ohio, Commissioner of Corrections (1970) 34

United States Supreme Court Rules 17

Webster's New Twentieth Century Unabridged Dictionary 31

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RESPONDENT'S BRIEF

OPINION BELOW

The opinion of the Supreme Court of Ohio (A. 83-88) is reported at 18 Ohio St. 2d 182; 248 N. E. 2d 614.

JURISDICTION

On June 11, 1969, judgment was entered by the Supreme Court of Ohio (A. 82). On July 31, 1969, a petition for Writ of Certiorari was filed and on June 1, 1970, it was granted (A. 89), The jurisdiction of this Court rests upon 28 U.S. Code, Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the Ohio statute which provides that the trier of fact shall determine both guilt and punishment in a single verdict in cases of murder in the first degree violates Petitioner's right to be free from self-incrimination.

2. Whether the Ohio statute which provides that the trier of fact may grant or withhold a recommendation of mercy in cases of murder in the first degree, and which provides no standards or criteria to assist the trier of fact in making such determination, violates the Petitioner's right to Due Process and Equal Protection of the law.

STATEMENT

The Brief of Amicus Curiae United States contains an adequate statement of facts pertaining to the Crampton case.

SUMMARY OF ARGUMENT

There is no constitutional requirement for a split-verdict or 'bifurcated trial' where the trier of the fact determines both guilt and punishment [*Spencer v. Texas*, 385 U. S. 554 (1967)]. The petitioner was not faced with a collision of constitutional rights in the trial of his case because he has no specific statutory or constitutional right to offer evidence of allocution prior to a verdict which determines guilt and punishment [*Hill v. U. S.*, 368 U. S. 424 (1962); *Williams v. N. Y.*, 337 U. S. 241 (1949)]. The petitioner's Fourteenth Amendment right to be heard in the case at bar

was unfettered. By his own choice, and for reasons best known to himself, petitioner declined to take the witness stand in his own defense. Instead, he presented his defense of insanity, diminished responsibility and mitigation through other witnesses. That decision was a free choice which petitioner made in his own interest and not as a result of pressures imposed by the State [*Williams v. Florida*, 399 U.S. 78 (1970); *Sequra v. Patterson*, 402 F. 2d 249 (1968)]. Petitioner's claim of unfairness is not supported by the record in that the jury had all the relevant evidence in this case and the mere fact that impeaching evidence may have been introduced had he taken the stand would not, of itself, be violative of Due Process, [*Spencer v. Texas*, 385 U. S. 554 at 565 (1967)].

II

An analysis of the plain meaning of the Ohio statute (§2901.01 Ohio Revised Code) makes clear that the intent of the Ohio Legislature was not to authorize arbitrary and capricious executions, but to attempt to individualize punishment.

The attack on jury sentencing based on absence of standards undermines all discretionary punishment procedures, up to and including the power of executive clemency, because Due Process requirements apply to all penological systems. [*Skinner v. Oklahoma*, 316 U.S. 535 (1942)], and [*Giaccio v. Pennsylvania*, 382 U.S. 399 (1966)], are no authority for petitioner's argument, as this Court has frequently indicated that the concept of Due Process is not so narrow as to exclude discretionary jury sentencing [*With-*

erspoon v. Illinois, 391 U. S. 510 (1968), *Williams v. Florida*, 399 U.S. 78 (1970)].

Ohio courts have restricted penalty juries to a consideration of the evidence in the case deciding whether to recommend or withhold mercy [*State v. Caldwell*, 135 Ohio St. 424, 21 N.E. 2d 343 (1939)], a "standard" which can be readily evaluated by applicable Due Process criteria, unlike the proposed standards of the Model Penal Code. Even avowed opponents of capital punishment contend that the imposition of standards is not the solution to the problem [56 *Cal. Law. Rev.* 1268, 1270 (1968)]. Those who oppose capital punishment should pursue its elimination in the legislative arena, where some success has already been achieved.

There is a fundamental inconsistency in an approach which simultaneously assumes "irrational, arbitrary and capricious" juries and "enlightened public opinion" which no longer tolerates the imposition of the death penalty. Petitioner therefore fails to show either Due Process or Equal Protection violations under existing Ohio practice.

ARGUMENT

I

THE OHIO STATUTE WHICH PROVIDES THAT THE TRIER OF FACT SHALL DETERMINE BOTH GUILT AND PUNISHMENT IN A SINGLE VERDICT IN CASES OF MURDER IN THE FIRST DEGREE IS NOT VIOLATIVE OF PETITIONER'S RIGHT TO BE FREE FROM SELF-INCRIMINATION.

A. Applicable Ohio Statutory and Case Law Concerning The Recommendation of Mercy By The Trier of the Facts in a Capital Case.

Murder in the First Degree under Ohio law is punishable by death unless the court[1] or jury makes a recommendation

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1. Ohio law provides for a waiver of jury trial in a capital case and should an accused plead guilty, a bench trial is had to determine the degree of the crime. *Ohio Revised Code, Section 2945.06,* provides in part:

> ". . . If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of the supreme court. Such judges or a majority of them may decide all questions of fact and law arising upon the trial, and render judgment accordingly. If the accused pleads guilty of murder in the first degree, a court composed of three judges shall examine the witnesses, determine the degree of crime, and pronounce sentence accordingly. In rendering judgment of conviction of an offense punishable by death upon plea of guilty, or after trial by the court without the intervention of a jury, the court may extend mercy and reduce the punishment for such offense to life imprisonment in like manner as upon recommendation of mercy by a jury. . ."

of mercy.[2] The mandatory death sentence for Murder in the First Degree in Ohio was changed in 1898 by the following legislative addition to the penalty portion of the statute:

> "...unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life."[3]

The brief filed by Amici contains an extensive review of the Ohio cases pertaining to the issue of a mercy recommendation.[4] With two exceptions,[5] we concur in that review

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2. *Ohio Revised Code, Section 2901.01*:

> "No person shall purposly, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another.
>
> Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life.
>
> Murder in the first degree is a capital crime under Sections 9 and 10 of Article 1, Ohio Constitution."

3. 93 *Ohio Laws* 223 (1898). Ohio has five other statutes conferring capital sentencing discretion to a jury and has two non-capital criminal statutes conferring that same power.

4. Brief of Amici, pp. 21 to 26 and footnotes 31 through 41. Hereinafter Amici Curiae NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent will be referred to as Amici.

5. It is submitted that the law of Ohio as evinced by the decisions of the Supreme Court of Ohio is that the granting or withholding of a mercy recommendation is within the absolute discretion of the jury, but to be based upon the evidence in the case.

The conclusion of Amici that a jury must make an affirmative

finding in order to grant mercy and none to withhold mercy is merely an assumption (See Amici Brief, page 22, footnote 34). The assumption is based upon a superfluous statement by the writer of the opinion in *Massa v. State*, 175 N.E. 219 (1930). The court, by way of obiter stated that the death penalty was warranted in view of the evidence in the case; that he found nothing in the record to support a recommendation of mercy. The case was not on review as to the basis upon which the jury determined the penalty and, as a matter of law, could not be. (See cases cited by Amici at page 27 of their brief) If the granting or withholding of mercy cannot be reviewed in Ohio, can it fairly be said that Ohio law, in effect, requires an affirmative evidentiary ground to grant mercy and none to withhold it? We submit that it could just as well be said that withholding mercy requires an affirmative evidentiary ground.

Amici next state (pages 22-23, footnote 35) that the State of Ohio excludes scrupled jurors from capital cases. Apparently the contention is based upon the statement found in the case of *Howell v. State*, 102 O.S. 411, 131 N.E. 706 (1921), wherein the court cautioned that any decision on penalty should be based on evidence or lack thereof and not on any scruples or facts which may have come to their knowledge while not acting as a juror. (See direct quote in Amici's Brief, page 22-23) Ohio law in regard to exclusion of jurors in a capital case is stated in *Ohio Revised Code, Section* 2945.25 (C):

> "A person called as a juror on an indictment may be challenged for the following causes:
>
> . . .
>
> (C) In the trial of a capital offense, that his opinions preclude him from finding the accused guilty of an offense punishable with death. . ."

This statute was in effect at the time of *Howell* and is still in effect. This type of exclusion was differentiated in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and cannot be interpreted as excluding people who have scruples against capital punishment.

and will not duplicate the matter in this brief.

Ohio law provides for the introduction of character evidence by a defendant.[6] He may parade any number of such witnesses to show his reputation and background. The State may not introduce any evidence in regard to the character of a defendant until and unless the defendant tries to establish his good character.[7] However, the State may in its case in chief introduce evidence of any acts of the defendant which, if material, tend to show motive, intent, ab-

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6. *Ohio Revised Code, Section 2945.57*:

> "The number of witnesses who are expected to testify upon the subject of character or reputation, for whom subpoenas are issued, shall be designated upon the praecipe and, except in cases, of murder in the first and second degree, manslaughter, rape, assault with intent to commit rape, or selling intoxicating liquor to a person in the habit of becoming intoxicated, shall not exceed ten upon each side, unless a deposit of at least one per diem and mileage fee for each of such additional witnesses is first made with the clerk of the court of common pleas. . ."

7. *Ohio Revised Code, Section 2945.56*:

> "When the defendant offers evidence of his character or reputation, the prosecution may offer, in rebuttal thereof, proof of his previous conviction of a crime involving moral turpitude, in addition to other competent evidence."

sence of mistake or accident on his part.[8] The latter type of evidence must be accompanied by a limiting instruction to the jury as to the purpose of the evidence.[9] Case law in Ohio has restricted the introduction of this type of testimony in respect to the time, locality and character of the act and, in addition, the act must fall within the designation of *crimen falsi* of the common law.[10] The credibility of the

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8. *Ohio Revised Code, Section 2945.59:*

> "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

9. *State v. Crafton*, 15 Ohio App. 2d 160, 239 N. E. 2d 571 (1968), reversible error for failure of the trial court to charge on limited purposes of the testimony even though no request to charge was made.

10. *State v. Hickman*, 102 Ohio App. 78, 141 N.E. 2d 202 (1956), the acts must be so related to the offense charged, in character and point of time, as tend to show intent, motive, habit or state of mind, provided acts come within designation of *crimen falsi* of the common law; See also *State v. Cocco*, 73 Ohio App. 182, 55 N.E. 2d 430 (1943); within a reasonable period of time in the same locality.

The Ohio cases reveal that this type of evidence is very limited. See *State v. Moore*, 149 O.S. 226, 78 N.E. 2d 365 (1948), threats by defendant against a third person prior to killing; *State v. Strong*, 119 Ohio App. 31, 196 N.E. 2d 801 (1963), boasts made by defendant to third persons of having committed offenses of arson and sex deviation not admissable in murder case; *State v. Chapman*, 111

testimony of the defendant or of any witness may be impeached by showing prior convictions of crime.[11]

Ohio App. 441, 168 N.E. 2d 14 (1959), evidence of prior sex relations with victim's sister eight years prior to crime charged not admissible in rape and incest violation.

11. *Ohio Revised Code, Section 2945.42*:

> "No person is disqualified as a witness in a criminal prosecution by reason of his interest in the event thereof as a party or otherwise, or by reason of his conviction for crime. . .Such interest, conviction, or relationship may be shown for the purpose of affecting the credibility of such witness. . ."

This statute permits examination as to convictions of a witness for an offense under state laws. *State v. Murdock*, 172 O.S. 221, 174 N.E. 2d 543 (1961). It does not include convictions under city ordinances. *Coble v. State*, 31 O.S. 100 (1876).

Petitioner at page 11 of his brief, footnote 14, has cited the case of *State v. Hector*, 19 O.S. 2d 167, 249 N.E. 2d 912 (1969) for the proposition that a defendant can be cross examined as to pending indictments. The case cited does not stand for that proposition whatsoever. The case involved a witness for the State where the defense desired to show that by testifying for the State, the witness was in hope of leniency on his own charges. In this regard the statement in *Keveny v. State*, 109 O. S. 64, 141 N. E. 845 (1923) states the law:

> "Of course you cannot impeach a witness by merely showing an indictment, but you may affect his interest in his present testimony. . ."

The rule as to showing interest by pending indictment would never be applicable to a defendant, and we suggest that any attempt to do so would be misconduct, grounds for mistrial, and reversible error.

Counsel for petitioner has urged this Court that mitigation and background evidence of the accused is totally inadmissible in a capital case in Ohio.[12] We cannot agree with such statement in view of the opinion of the Ohio Supreme Court in this very case.[13] We quote from that opinion which appears at page 86-87 of the Appendix of this case:

> "Defendant argues that, if an accused elects to assert his right against self-incrimination, he can not present any evidence which would tend to mitigate on the question of his punishment.
>
> "*This is obviously not true. Defendant can, as he did in the instant case, present such testimony by witnesses other than himself.*"
>
> (*Emphasis Ours*)

Petitioner's reliance upon *Ashbrook v. State*, 49 Ohio App. 298, 197 N. E. 214 (1935) and *State v. Ellis*, 98 O. S. 21, 120 N. E. 218 (1918) is questionable, to say the least, in view of the holdings in *Shelton v State*, 102 O. S. 376, 131 N. E. 704 (1921) and *Howell v. State*, 102 O.S. 411, 131 N.E. 706

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12. Petitioner's Brief, page 21.

13. *State of Ohio v. James Crampton*, 18 O.S. 2d 182, 248 N.E. 2d 614 (1969).

(1921).[14] Further, in *State v. Caldwell*, 135 O. S. 424 at 428, 21 N. E. 2d 343 (1939) cited by petitioner at page 21, footnote 24, of his brief, it should be specifically noted that the court's reason for finding no prejudicial error in not giving the charge requested relating to the jury's consideration of sociological matters and environment which they may find from the evidence, was that the requested instruction was substantially identical to the answers the Court gave the jury. In addition, the mere instruction presupposes that sociological and environmental matters were in evidence in the case. At page 428 of the opinion, the Court stated:

> "Clearly, the question was not directed to the evidence of the environment of the defendant as contained in the record."

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14. *Shelton v. State*, 102 O.S. 376, 131 N.E. 733, (1921)

"Syl. 1. It is the privilege of an accused upon trial to argue to the jury in person or by counsel every controlling fact which the evidence tends to support, and every reasonable inference therefrom touching the question of his guilt or innocence, or which may tend to mitigate or lessen the penalty, where the jury are empowered to fix such penalty.

"Syl. 2. Upon trial, under an indictment for murder in the first degree, a refusal to permit the accused in person or by counsel to argue to the jury the desirability, advisability or wisdom of recommending mercy, is a denial of the right of the accused to 'defend in person and with counsel' under Section 10, Article I of the Constitution of the State of Ohio."

Howell v. State, 102 O. S. 411, 131 N. E. 706, (1921)

"Syl. 4. In such a case, it is not error for the trial court to permit counsel for the state to argue that a recommendation for mercy should be withheld."

See also *State v Frohner*, 150 O. S. 53, 95, 80 N. E. 2d 868 (1948), wherein the appellant's entire case was pointed toward an extension of mercy.[15]

B. The Unitary Trial Procedure In A Capital Case Where The Trier of The Facts Determines Both Guilt and Punishment is Fundamentally Fair Under the Due Process Clause And Does Not Violate An Accused's Fifth Amendment Protection Against Self-Incrimination.

The attack by the petitioner and amici[16], on the unitary trial procedure has been on two fronts: one, that the procedure is fundamentally unfair[17] in that (a) if an accused takes the stand, evidence may be presented which is prejudicial to the guilt issue, and (b) if an accused does not

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15. *State v. Frohner*, 150 O. S. 53, 80 N. E. 2d 868 (1948) wherein the court also stated at page 117:

"All that was sought in this case below was an extension of mercy. In an effort to sustain such request the family life of appellant's parents was gone into."

In *State v. Lucas*, 93 Ohio App. 281 at 288; 109 N.E. 39 (1952) where twelve witnesses testified as to reputation and character the court stated:

"Undoubtedly this testimony was presented for the purpose of influencing the judges in favor of an extension of mercy."

16. Brief of Amici, pp. 72 through 74; brief of petitioner pp. 9 through 19.

17. Amici's brief, Appendix A, page 69. But see argument of Anthony Amsterdam in *Maxwell v. Bishop*, 398 U.S. 262 (1970) in 7 Criminal Law Reporter 4039 (5-13-70). "On the single verdict issue, I want to make perfectly clear that we are not relying on any general unarticulated standard of 'fairness'. We are relying on specific constitutional rights."

take the stand he may be sentenced on less than all of the relevant evidence; and two, that a capital defendant's Fifth Amendment protection against self-incrimination is violated if he exercises his "constitutional" right to allocution before verdict on the guilt issue.[18] It is to be noted that neither petitioner nor amici maintain that the State is constitutionally compelled to have a bifurcated trial in a capital case.[19]

This Court in *Spencer v Texas*, 385 U. S. 554, 567 (1967), specifically rejected the bifurcated trial as being a constitutional commandment under the Fourteenth Amendemnt, and expressed the view that such a matter was legislative and a determination which, if made by the Court, would be an unjustifiable encroachment upon the powers of the State.

Not being constitutionally compelled to have a bifurcated trial, does the unitary trial unconstitutionally burden the exercise of an accused's Fifth Amendment privilege against self-incrimination, and further, does the procedure under which a capital case is tried in Ohio run afoul of the Due Process requirements of the Fourteenth Amendment to the United States Constitution?

The petitioner in the instant case elected not to take the stand and be subject to cross-examination. The record reveals that petitioner instead presented four witnesses, none

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18. *Id.* at page 76, footnote 77:

> "The effect of the single verdict sentencing procedure which he challenges is to confront a capital defendant with the grim specter of having to sacrifice one or another of his precious constitutional rights, either allocution or self-incrimination."

19. *Id.* at page 78, footnote 79.

of whom testified in respect to the facts of the crime (R. 278 et seq). Guilt in this case was never seriously contested and, consequently, the petitioner's case was largely medical in nature. The petitioner's mother testified and gave the jury the benefit of the petitioner's childhood and general background. (A. 49-59). The medical testimony, because of its psychiatric nature, brought out the petitioner's entire personality; and because the petitioner felt inclined to introduce various hospital reports, his entire life history was displayed to the jury. We can only assume that this was done in an effort to mitigate the penalty since there was nothing contained in the records which support a conclusion that petitioner was not guilty by reason of insanity. Thus, all that could be said of petitioner's life was before the jury without the necessity of his having had to take the stand.

Petitioner and amici urge that this type of situation aggravates the 'tension' as to his constitutional right to remain silent and his desire to produce mitigating testimony. We submit that defendant can introduce such evidence by other witnesses, and that, nevertheless, the unitary trial is not by its nature unconstitutionally coercive.

The arguments in this regard are very well stated in *Sequra v. Patterson*, 402 F. 2d 249 (10th Cir., 1968), wherein there appears:

> "One answer to this contention is that mitigating evidence could be introduced through other witnesses. Nevertheless, it is quite conceivable as indeed it was shown below, that the accused may be the only available source of material mitigating information. Therefore, there is a strong compulsion to take the stand.

> *This compulsion does not derive from any coercion of the State.* Instead, it arises from the desire of the accused to act in his own enlightened self-interest. He is compelled to testify only in the sense that it may be to his advantage to do so. The choice is his embracing no more substantial 'chilling effects' in a single verdict situation than it does in any other instance. It is always the case that in exercising the constitutional right to remain silent, the individual is forced to forego his opportunity to personally appeal to the jury. Whether such an appeal relates to the determination of guilt or punishment or both, it cannot be denied that the inducement not to remain silent and thus to forego a specific constitutional right does not arise from any unnecessary burden imposed by the State. We conclude that the single-verdict procedure does not 'needlessly chill the exercise of basic constitutional rights'. (Emphasis Ours)

A defendant during a criminal trial is often faced with a similar choice in regard to the issues of self-defense, accident, duress, insanity, lesser included offenses, and alibi. Petitioner and amici might also argue that these issues require separation on the constitutional claim that a defendant has a Sixth Amendment right to present his defense, but that to do so would impinge his Fifth Amendment right to remain silent. To carry this to its extreme could in some cases involve a four-stage trial, and we can see no reason why such a ruling would not be applicable to all criminal

trials where more than one issue may be involved.[20] The effect of such a procedure on the administration of criminal justice would be devastating. It would be an affront to the jury system and an insult to the intelligence of the people of the United States. They are the persons who share in the responsibility of the administration of criminal justice by the giving of their time and energy to serve as jurors and decide different issues under proper instructions by a court. The court in *Spencer v. Texas, supra,* at 565 stated:

> "It would be extravagant in the extreme to take *Jackson* as envincing a general distrust on the part of this court of the abilities of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case, or as standing for the proposition that limiting instructions can never purge the erroneous introduction of evidence or limit evidence to its rightful purpose."

and as noted by the Court in its footnote to this premise:

> "Indeed the most recent scholarly study of jury behavior does not sustain the premise that juries are especially prone to prejudice when prior crime evidence is admitted as to credibility. Kalven and Zeisel, The American Jury (1966), the study contrasts the effect of such evidence on judges and juries, and concludes that 'Neither the one nor the other can

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[20] Petitioner in the case at bar has injected an additional issue which is beyond the limitations of the writ granted herein. Inasmuch as the insanity issue was not within the issues designated in the granting of certiorari, we have declined to comment in that regard. (Rules of the Supreme Court 40 (i) (d) (2).

be said to be distinctively gullible or skeptical.' Id. at 180."

The late Justice Felix Frankfurter in his report to the Royal Commission on Capital Punishment stated:

> "May I say, with all respect, I do not understand the view that juries are not qualified to discriminate between situations calling for mitigated sentences."[21]

This Court has recently discussed the question of 'compelled' incrimination in the case of *Williams v. Florida*, 399 U. S. 78 (1970) wherein it was stated by Justice White that:

> "The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. . . .That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination."

That case dealt with notice of alibi, but the principle remains the same. Justice White's further comment that there is nothing in the Fifth Amendment which would entitle a defendant to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand is particularly applicable to the procedure requested by petitioner and amici. There have been no added pressures brought to bear on the defendant, and the State has not added to the natural consequences of the trial. He is simply left the choice of testifying in an effort to either escape conviction or reduce the effect thereof, or not testifying because he feels he stands a better chance remaining

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21. Elman, Of Law and Men (1956)

silent. The benefit is with the defendant in that he can make that choice with full knowledge of the possible benefits or detriments to him. As Justice Black stated in his dissent in the *Williams* case, *supra*,

> "...and obviously there will be times when the trial process itself will require the defendant to do something in order to try to avoid a conviction."

The petitioner and amici have particularly stressed the case of *U. S. v. Jackson*, 390 U. S. 570 (1968) as supporting their contention that the unitary trial imposes a needless burden which "chills" the exercise of basic constitutional rights. We believe the principles of the *Jackson* case to be clearly distinguishable from the issues in the case at bar. First, *Jackson* dealt with specific constitutional rights: the Fifth Amendment right not to plead guilty and the Sixth Amendment right to demand a jury trial. As will be shown later in this brief, allocution is not a specific constitutional right. Second, the petitioner, in the case at bar, was not subject to a different penalty depending on his choice of a jury or court trial or in his choice of taking the stand or not.[22] There was, therefore, no extra burden imposed by the State. The choice was that of the petitioner, and it must be assumed that he made the choice which he knew was most favorable to himself. It cannot therefore be said that the unitary trial "needlessly encourages" the waiver of the right to remain silent.

Petitioner next places reliance on *Jackson v. Denno*, 378 U. S. 368 (1964). Again, as noted in *Spencer v. Texas*,

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22. See *Calloway v. U. S.*, 399 F. 2d 1006 at 1009 n. 4 (CADC) cert. denied 393 U.S. 987 (1968) (*U.S. v. Jackson* distinguished).

supra, the Court in *Jackson v. Denno, supra*, was dealing with specific constitutional rights and the procedure set forth therein was designed as a specific remedy to insure that an involuntary confession was not, in fact, relied on by a jury, 385 U. S. at 565. Amici's premise that *Jackson v. Denno, supra*, is not weakened by *Spencer v. Texas, supra*, is erroneously based on an alleged 'specific constitutional right' to allocution.

This Court in *Hill v. U. S.*, 368 U. S. 424, 428, (1962), held that allocution is not a constitutional right.[23] In *Williams v. N. Y.*, 337 U. S. 241 (1949), this Court held that the Due Process clause of the Fourteenth Amendment did not require a judge to have hearings and give a convicted person an opportunity to participate in those hearings when he came to determining the sentence to be imposed. As stated in *Sequra v. Patterson*, supra,

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23. *Hill v. U.S.*, 368 U.S. 424, 428 (1962)

> "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. *It is an error which is neither jurisdictional nor constitutional.* It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." (Emphasis ours)

Although the *Hill* decision was based on a non-capital case, the constitutional question involved is the same. See *Myers v. Frye*, 401 F. 2d 18, 21, (7th Cir. 1968), a capital case where the doctrine of *Hill* was followed.

> "If a judge need not allow allocution as a constitutional right when determining the penalty, it follows that there is likewise no such right to so influence a jury."

The cases of *Skinner v. Oklahoma*, 316 U. S. 535 (1942) and *Specht v. Patterson*, 386 U. S. 605 (1967) do not support petitioner or amici's statement that allocution is a constitutional right.[24] The *Specht* case cited by petitioner and amici adhered to the decision of *Williams v. N. Y.*, *supra*. However, the court could not extend the *Williams v. N. Y.*, doctrine to a Colorado habitual sex offender procedure which did not make the commission of a specified crime the basis for sentencing. The question, as noted by the court, was similar to the recidivist cases where a distinct issue was presented and naturally defendant must have a full opportunity to be heard, etc. Thus, no comparison can be used by petitioner insofar as the rationale of the *Specht* case is concerned. The petitioner in the instant case had an opportunity to be heard, etc. Moreover, the petitioner was free to place in evidence mitigating and background evidence, which he did through his mother. Psychiatric evidence was introduced going toward diminished responsibility and insanity.

The *Skinner* case, *supra*, was decided on an equal protection basis and not on his opportunity to be heard. There, as in the case of *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), there was an invidious discrimination. As will be shown in our "Standards" argument, no invidious discrimination can be shown in a unitary trial procedure.

Consideration of what is stated by the Court in *Williams v. N. Y.*, *supra*, 251-2:

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24. Brief of Amici, page A-71 and footnote 77 at page A-75-76.

> "...And it is conceded that no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all."

implies that allocution is not a specific constitutional right. If a judge may sentence a man for no reason at all, allocution cannot be said to have constitutional status.

Under Ohio practice, no special procedure has been enacted for allocution in a capital case, other than by the defendant's opportunity to testify or to have other witnesses testify at the trial itself. There is nothing in Ohio comparable to the Federal sentencing procedure under rule 32 (a) of the Federal Code of Criminal Procedure which specifically provides for the court to consider evidence in mitigation. In view of this, the cases cited by amici and petitioner concerning procedural Due Process do not apply. An example is the case of *Coleman v. U.S.*, 334 F. 2d 558 (D. C. Cir. 1964), where, after the District of Columbia mandatory death penalty statute was amended to provide for recommendations of life imprisonment, a statute was enacted to establish a procedure for reduction of sentence. As stated at page 562 in that opinion:

> "Whereas in cases charging murder in the first degree *after* March 22, 1962, a jury was authorized to recommend life imprisonment, as to appellant's case a 'procedure' was established whereby *the judge* was 'to consider the circumstances in mitigation and in aggravation." (Emphasis Ours).

In such a situation, as in a split-verdict procedure, allocution has specifically been provided for by statute and procedural Due Process would then require a fair determination of the issues involved. In this sense only would allocution as part of the sentencing process be subject to the scrutiny of Due Process.The statement of amici at page 71, footnote 75, that allocution is a constitutional right is not supported by the decisions cited in that footnote. See *Green v. U.S.*, 313 F. 2d 6 (1st Cir. 1963); *U.S. v Johnson*, 315 F. 2d 714 (2nd Cir. 1963); and *Behrens v. U. S.*, 312 F. 2d 223 (7th Cir. 1962), affirmed 375 U.S. 162 (1962). Those decisions were based in two instances on rule 32 (a) of Federal Rules of Criminal Procedure and in the other case on rule 43 requiring presence of defendant and counsel. In each case, the procedure giving the opportunity for allocution was in some way erroneously conducted. But there is nothing in those opinions which can be interpreted as holding allocution in and of itself to be a constitutional right.[25]

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25. See *U.S. ex rel Darrah v. Brierly*, 290 F. Supp. 960 (1968) at 963 where it is stated:

"However, there is no constitutional right to allocution. *McGrady v. Cunningham*, 296 F. 2d 600, 96 A. L. R. 2d 1286 (4th Cir. 1961); *Application of Rodriquez*, 226 F. Supp. 799 (D. N. J. 1964); *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244 (S. D. N. Y. 1966). Although allocution is afforded a defendant as of right in all Federal Criminal proceedings, F. R. Crim. Proc. 32 (a.); *United States v. Allegrucci*, 299 F. 2d 811 (3rd Cir. 1962), the basis therefor does not rest upon constitutional grounds. Indeed, the Supreme Court of the United States has expressly indicated its reluctance to base the Federal right embodied in Federal Criminal Rule 32 upon the Constitution.

"[12] Instead, it merely observed that this right is "ancient in the law." *United States v. Behrens*, 375 U.S. 162, 165, 84 S. Ct. 295, 11 L. Ed. 2d 224

Although Ohio has a mandatory statute requiring the court to inquire of the defendant whether he has anything to say before sentence is pronounced[26], the practice, because of the unreviewability of the death sentence, is a mere formality in capital cases and the two non-capital cases in Ohio where

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(1963).

"See also *McGrady v. Cunningham*, 296 F. 2d 600 (1961). A state court conviction of murder in the first degree where no allocution was had. The Court stated at page 602,

"The only two cases cited on this point are federal cases, *Couch v. U.S.*, 98 U.S. App. D. C. 292, 235 F. 2d 519, and *Green v. U.S.*, 365 U.S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670. Both of these cases arose under rule 32 (a) F. R. Cr. P., 18 U. S. C. A., which provides, insofar as material, as follows:

> 'Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.'

"There is no similar rule applicable by statute or rule of court in Virginia and apparently it has never been suggested before that there is any such rule in Virginia . . .

"We conclude therefore that there is no merit in the appellant's contention on this point and we may further remark in passing that even under the federal rule failure to grant the right of allocution directly to the prisoner rather than to counsel for the prisoner would not entitle the prisoner to a new trial. The only effect would be to set aside the sentence and send the case back for resentencing after compliance with the rule. See *Couch v. U. S., supra,* and *Green v. U. S., supra.* And this is also the rule in the states that still require allocution."

26. *Ohio Revised Code, Section 2947.05*:

> "Before sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, or the finding of the court, and asked whether he has anything to say as to why judgment should not be pronounced against him."

a jury fixes the punishment. It is to be noted also that the Ohio statute is far short of Federal Rule 32 (a) which speaks of evidence in mitigation.

In most non-capital cases, the defendant can, after being convicted, be referred to a probation department for a pre-sentence investigation and report.[27] If the court refuses a referral to the probation department, the defendant can still invoke Ohio Revised Code, Section 2947.06 to hear testimony to mitigate the sentence.[28]

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27. *Ohio Revised Code, Section 2951.02*:

"Where the defendant has pleaded guilty, or has been found guilty and it appears to the satisfaction of the judge or magistrate that the character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and the public good does not demand or require that he be immediately sentenced, such judge or magistrate may suspend the imposition of the sentence and place the defendant on probation upon such terms as such judge or magistrate determines."

28. *Ohio Revised Code, Section 2947.06*:

"The trial court may hear testimony of mitigation of a sentence at the term of conviction or plea, or at the next term. The prosecuting attorney may offer testimony on behalf of the state, to give the court a true understanding of the case. The court shall determine whether sentence ought immediately to be imposed or the defendant placed on probation. The court of its own motion may direct the department of probation of the county wherein the defendant resides, or its own regular probation officer, to make such inquiries and reports as the court requires concerning the defendant, and such reports shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders . . . ."

In capital cases, inasmuch as the sentence of life or death is unreviewable either by the trial court or appellate court, the statute means nothing insofar as mitigation is concerned, and the only effect of error in this regard is to send the case back for resentencing.[29]

We earnestly submit that the arguments advanced here in support of bifurcation in the trial of a capital case are less compelling than the same arguments raised concerning the recidivist trial procedure in *Spencer v. Texas, supra.* In *Spencer*, the defendant's prior convictions were in evidence, whether or not he testified. In the case at bar, however, petitioner's prior convictions could come to the knowledge of the jury without his approval[30] only in two ways: (1) through cross-examination had he chosen to testify, and/or (2) through evidence of his prior convictions introduced pursuant to Section 2945.59, Ohio Revised Code.[31] As the record discloses, the State did not offer such evidence in this case for the reason that the prior acts would not have gone to the matters mentioned in the statute. Remoteness would have been an additional limiting factor.[32] It therefore appears that even the dissenters in *Spencer*, under the facts presented in this case, would agree that petitioner's constitutional rights have not been violated.

An exhaustive review of the cases in this matter discloses that the split verdict procedure may, in some ways,

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29. See *Salsby v. State*, 119 O. S. 314, 164 N. E. 232 (1928); *State v. Ausberry*, 83 Ohio App. 514, 82 N. E. 2d 751 (1947)

30. It should be remembered that petitioner himself introduced his recividist record by offering various hospital records.

31. See footnote 8, *supra.*

32. See footnote 10, *supra.*

be a more modern method of resolving the determination of guilt or innocence and punishment. However, none of the cases have held the single verdict procedure unconstitutional. Some of the courts have actively suggested in their opinions that their legislatures enact statutes requiring bifurcated trials.[33] Some courts have merely stated the proposition that this is not a judicial question but a legislative one.[34]

We would urge, as was suggested in *Frady v. U. S.*, 348 F. 2d 84 (D. C. Cir. 1964); *Pope v. U.S.*, 372 F. 2d 710, (8th Cir. 1967); and *U.S. v. Curry*, 358 F. 2d 904, 914-915 (2nd Cir. 1966) that because of the inherent problems in the adoption of such a procedure, the question is best left with the respective legislatures of the States. Only through comprehensive studies of the individual procedural and substantive laws of the respective states could such a procedure be put into effect without chaos.

As stated by Mr. Justice Cardozo in *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934), and repeated often by the court, a state rule of law

> "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar."

The Court has additionally stated that it was not a rule-making organ for the promulgation of state rules of crim-

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33. *State v. Mount*, 152 A. 2d 343 (1959), 30 N. J. 195 (legislation subsequently enacted).
U. S. ex rel, Thompson v. Price, 258 F. 2d 918, 922 (3rd Cir. 1958) (Legislation in Pennsylvania subsequently enacted).

34. *Johnson v. Commonwealth*, 158 S. E. 2d 725.

inal procedure, *Spencer v. Texas*, 385 U. S. 554, 564 (1967).

The trial in the instant case was fundamentally fair. Neither impeachment evidence nor prior convictions of crime were introduced by the State in the instant case. Had the same been introduced the court under Ohio law would have given the jury instructions concerning the limited purpose of such evidence. The petitioner was able to introduce background evidence and could have, if he so desired, introduced character testimony. Petitioner's and amici's objection to the unitary trial because of the possible infusion of prejudicial evidence concerning these latter issues is effectively answered in *Michelson v. U. S.*, 335 U. S. 469, 485 (1948):

> "limiting instructions on this subject are no more difficult to comprehend or apply than those upon various other subjects."

To say that allocution is a specific constitutional right is to read into the Constitution what is not there. The arguments of petitioner and amici based on that premise must fall.

The State of Ohio has as much, if not more, of a valid state purpose in maintaining its unitary trial proceedings in a capital case as Texas had in enforcing its former recividist statute in a unitary trial.

The unitary trial procedure has been in use throughout the history of our country by every state in the Union. There has been no showing in the arguments advanced by petitioner why Ohio law and practice should be an exception to the statement in *Spencer v. Texas, supra*:

"To say that the two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, and which we might well agree were the matter before us in a legislative or rule making contest, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment.

..."Two-part jury trials are rare in our jurisprudence; they have never been compelled by this court as a matter of constitutional law, or even as a matter of federal procedure. To take such a step would be quite beyond the pale of this court's proper function in our Federal system. It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these rules are not."

THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DO NOT REQUIRE STATUTORY STANDARDS FOR THE IMPOSITION OF THE DEATH PENALTY BY THE JURY IN A CAPITAL CASE.

The development of laws relating to capital crimes in the United States demonstrates a pattern beginning in the Nineteenth Century and continuing to the present day which shows increasing selectivity in imposing the death pen-

alty.[35] An analysis of the statutes of the State of Ohio and other states shows that the legislatures of the several states have attempted in various ways to permit those who try the case, whether judge or jury, some flexibility in deciding whether the death penalty is called for in every "capital" crime.[36] There can be no disputing the fact that the motivation of the legislatures has been largely humane and that the enactments are attempts to institutionalize the increasing sensitivity of civilized men and women with reference to the application of the death penalty.[37]

Petitioner and those supporting his position in this case argue that the practice in Ohio courts permitted under Section 2901.01, Ohio Revised Code, amounts to killing people at the whim of a jury. We will attempt to demonstrate that the facts argue otherwise, and that merely because statistics show that juries are becoming more and more selective in the administration of the death penalty, this does not demonstrate that the provisions of Ohio's First Degree Murder statute have become meaningless with reference to punishment.

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35. See Bedau, *The Death Penalty in America*, 27 (revised edition 1967). See also Appendix B, Brief of Amici.

36. Ohio Revised Code, Section 2901.01 (first degree murder)
Ohio Revised Code, Section 2901.02 (killing by obstructing a railroad)
Ohio Revised Code, Section 2901.03 (killing of a guard by a prisoner)
Ohio Revised Code, Section 2901.04 (killing a police officer)
Ohio Revised Code, Section 2901.27 (kidnapping for extortion)
Ohio Revised Code, Section 2901.28 (killing a kidnap victim)
See also Appendix B, Brief of Amici.

37. See Bedau, The Death Penalty in America, 1-8 (revised edition, 1967)

In effect, petitioner is employing a quantitative argument, saying that because only a minority of persons convicted of capital crimes are actually sentenced to death, one must view life imprisonment as the principal punishment prescribed for Murder in the First Degree. As is often the case in the interpretations of the Constitution by this Court, we think it is important to analyze first the plain meaning of the words in *Ohio Revised Code, Section* 2901.01 relating to penalty:

> "Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life."

While by no means attempting to exalt form over substance, we think it significant to note that the Ohio statute speaks in terms of "a recommendation of mercy."[38]

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[38]. *Black's Law Dictionary, 4th Edition,* defines "mercy" as follows:

> "The discretion of a judge, within the limits of positive law, to remit altogether the punishment to which a convicted person is liable, or to mitigate the severity of his sentence; as when a jury recommends the prisoner to the *mercy* of the court."

Webster's New Twentieth Century Unabridged Dictionary, 2nd Edition, defines "mercy" as:

> "1. A refraining from harming or punishing offenders, enemies, persons in one's power, etc., kindness in excess of what may be expected or demanded by fairness; forbearance and compassion.
>
> 2. A disposition to forgive, pity, or be kind.
>
> 3. The power to forgive or be kind; clemency; as, throw yourself on his *mercy*.
>
> 4. Kind or compassionate treatment; relief of suffering."

It is respectfully submitted that it would not be hyper-literal to point out that the definitions of "mercy" imply discretion. Indeed, the word itself is used in defining mercy. In the legal sense and in the recognized universal definitions of the word, which surely must have some significance for legislatures in the process of enacting our laws, the word implies the power to forgive or to be kind in excess of what may be expected or demanded by fairness. Petitioner here seeks to argue that the exercise of such a power is not only unconstitutional within the meaning of the applicable clauses of the Fourteenth Amendment, but "irrational."[39] It is respectfully submitted that an honest examination of the words of the statute with attention to their accepted meanings, cannot but result in the conclusion that the exercise of the power is not irrational, but is, rather, the exercise of forbearance and compassion, human qualities long exalted in both the moral and legal traditions of civilized society.

Petitioner and amici seek to establish that because it is statistically demonstrable that capital punishment is not imposed in a majority of cases where defendants are convicted of capital crimes, such disposition is the "normal" course of justice.[40] Presumably, it makes the imposition of capital punishment in such cases "abnormal", and also "abnormal" the State's attempts to provide every possible opportunity for the exercise of human ideals, including statutory means by which defendants convicted of capital crimes can be spared the death penalty.

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39. Brief of petitioner, James Edward Crampton, page 31.

40. Brief of amici, page 69.

We maintain, therefore, that an observation and analysis of the statute involved cannot but result in the conclusion that it manifests a bona fide attempt to permit juries the exercise of human qualities which may go beyond the mere basic requirements of justice.[41]

It will no doubt be argued that the absence of standards permits the exercise of the decision-making power of the jury in capital cases on basis other than compassion and kindness; indeed, perhaps on the basis of prejudice, fear, hatred, and other human qualities not so exalted. The question then becomes: is it a violation of Due Process or Equal Protection when punishment consists of two possible alternatives to be selected in the discretion of the jury? It is submitted respectfully that the answer to the last preceding question is "no", whether the Ohio concept of "mercy" or the California concept of "discretion" is relied upon, and the remainder of the argument herein is an attempt to support that conclusion.

Petitioner contends that *Skinner v. Oklahoma*, 316 U. S. 335 (1942), means that Ohio cannot give its juries power to draw a distinction between those capital defendants who receive the death penalty and those who are sentenced to life imprisonment. If so, then how may Ohio give its Governor the power? The Constitution of Ohio vests the entire pardoning power in the Governor.[42] The only limitation on such power is found in the Constitution itself.[43]

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41. See Brief of amici curiae United States I (A) 1.

42. Article III, Section 11 of the Ohio Constitution.

43. See *Licavoli v. State*, 20 O. O. 562, 568, 34 N. E. 2d 450, (1935).

No other body, whether legislative or judicial, can exercise like power.[44] The Governor may grant a reprieve, commutation, or pardon to any person under sentence of death with or without notice or application from the convicted felon.[45]

In Ohio, any condemned person can make application to the Pardon and Parole Commission. Each application received is acted upon by the Commission. The Commission, after investigating the case, makes a recommendation for or against the granting of the reprieve, pardon, or commutation to the Governor.[46] The Governor acts individually upon each application he receives. After a capital felon has exhausted all of his judicial appellate remedies, he still is afforded this executive remedy. The exercise of the power of clemency is sought by almost all convicted felons sentenced to death in Ohio.[47] If a convicted capital

44. *Knapp v. Thomas*, 39 O. S. 377, 48 Am. Rep. 462 (1883).

45. Ohio Revised Code, Section 2965.14.

46. Ohio Revised Code, Section 2965.13.

47. The following table shows the ultimate disposition of cases involving the death penalty in Ohio. These statistics were provided by the Governor's Office, Commissioner of Corrections, Ohio Penitentiary. From the table, it can be seen that one-third of all the death sentences in the State of Ohio from 1956 up to and including July, 1970, were commuted by the Governor.

Years	Men Rec'd.	Executed	Lima State Hospital	Commuted	Death Row
1956-60	28	12	4	12	0
1961-65	24	3	2	12	7
1966-70	39	0	0	6*	33
Total	91	15	6	30	40

*During this period from 1966 up to and including July 2, 1970, there were only six (6) commutations of sentences granted by the Governor.

felon is denied Due Process and Equal Protection by the jury imposing the death penalty without standards, then the same defendant is denied Due Process and Equal Protection when the Governor sees fit to grant one convicted felon a pardon or commutation and not another. Both would have to be declared unconstitutional if either one were so declared. Stated otherwise, if the Governor's clemency power is not violative of Due Process and Equal-Protection guarantees, then it cannot be a violation of those guarantees for a state to grant a trial jury the right to recommend mercy.

Petitioner relies principally on two decisions of this Court to support his contention that the imposition of the death penalty within the discretion of the jury is a violation of Due Process and Equal Protection. First is the case of *Skinner v. Oklahoma, supra.* Petitioner relies on this case as authority in support of the Equal Protection argument because the court in that case held that the State of Oklahoma could not sterilize thieves without sterilizing embezzlers. Citing the case of *Yick Wo v. Hopkins,* 118 U. S. 356 (1886), the Court in *Skinner* said:

> "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.[48]

The law of the State of Ohio makes no such invidious discrimination. It simply says that the punishment for Murder in the First Degree shall be death, and that the jury

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48. *Skinner v. Oklahoma,* 316 U. S. 535, 541 (1942).

which hears the case will have the right to decide whether the punishment in a particular case, in its discretion, should be imprisonment for life. There is no distinction between First Degree murderers *in the law.* The distinction is made and the discrimination lies in the decision of the jury which hears the case. The petitioner's attempt to argue that the power thus granted First Degree Murder juries by the law of Ohio to discriminate is invidious does not succeed. Indeed, in *Yick Wo,* this Court struck down a licensing law which permitted discrimination against individuals of a specific nationality because the evidence disclosed that persons of Chinese origin had, in fact, been discriminated against.[49] In the instant case, however, there is no showing and no argument that the operation of Ohio's First Degree Murder statute has been unfair or discriminatory on the basis of race, creed, color, or any of the other constitutionally objectionable grounds for discrimination. Can there be invidious discrimination in the abstract? In the instant case, this Court is asked to declare a statute unconstitutional because the jury is given certain power within its discretion and not subject to standards in the usual statutory sense. Because the jury is not bound to specify its standards in the exercise of its judgment as to punishment, this Court is asked to create a presumption that the decisions of a jury in such a situation are irrational, therefore, invidious and therefore violative of the Equal Protection clause of the Fourteenth Amendment. We fail to see how this Court can find "invidious discrimination in the air."[50]

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49. *Yick Wo v. Hopkins,* 118 U. S. 356, 373 (1886)

50. See *Oyler v. Boles,* 368 U. S. 448 (1962).

In support of petitioner's claim that his Due Process rights have been violated, he cites *Giaccio v. Pennsylvania*, 382 U. S. 399 (1966), in which this Court overturned a Pennsylvania statutte permitting the assessment of costs against acquitted defendants, among others, and which imposed the threat of imprisonment for non-payment of such costs. Following a long and well-established line of decisions of this Court, it held in *Giaccio* that:

> ". . .a law fails to meet the requirements of the due process clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors to decide without any legally fixed standards *what is prohibited* and is not in each particular case. . . ."[51] (Emphasis ours)

It is apparent that the court was discussing the requirement that laws specify what *conduct* is prohibited in order to constitute a violation of law. In *Giaccio*, the situation could arise where a person was found not guilty and yet could be punished. That is a far cry from providing, as Ohio law does, that a person convicted of Murder in the First Degree must be put to death unless the jury which convicts him decides that his life may be spared. We, therefore, respectfully contend that *Giaccio* is inapplicable.

As petitioner and amici point out, no attack on the imposition of the death penalty at the discretion of the jury

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51. *Giaccio v. Pennsylvania*, 382 U. S. 399, 402 (1966).

has succeeded.[52] Indeed, even as this Court has approached the parameters of the issue presented in this case, it has, in more than one instance, indicated that in its view the administration of capital punishment as in Ohio is not violative of Fourteenth Amendment guarantees. As recently as last term, in the case of *Williams v. Florida*, 399 U. S. 78 (1970), the Court, in discussing the question of jury size as a Sixth Amendment right applied by the Fourteenth Amendment to the states, had this to say:

> "Legislatures may well have their own views about the relative value of the larger and smaller juries, and may conclude that, wholly apart from the jury's primary function, it is desirable to spread the collective responsibility for the determination of guilt among the larger group. In capital cases, for example, it appears that no state provides for less than 12 jurors—a fact which suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty."

Additionally, in *Witherspoon v. Illinois*, 391 U. S. 510, 514 (1968), this court described the responsibility incumbent upon a jury in a First Degree Murder case:

> "Guided by neither rule nor standard, 'free to select or reject as it (sees) fit', a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the con-

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52. *Spencer v. Texas*, 385 U. S. 554 (1966); *In Re Ernst Petition*, 294 F. 2d 556 (3rd Cir., 1961); *State v. Crampton*, 18 Ohio St.2d 182, 248 N. E. 2d 614 (1969); *Chatterton v. Dutton*, 223 Ga. 243, 154 S. E. 2d 213 (1967).

science of the community on the ultimate question of life or death."

And finally, the comment of the court in *Spencer v. Texas*, 385 U.S. 554,560 (1967) which has been relied upon:

> "Nor is it contended that it is unconstitutional for the jury to assess the punishment to be meted out to a defendant in a capital or other criminal case, or to make findings as to whether there was or was not a prior conviction even though enhanced punishment is left to be imposed by the judge. The states have always been given wide leeway in dividing responsibility between judge and jury in criminal cases."[53]

Petitioner contends that Ohio does, in fact, have a standard by which juries in capital cases are guided in determining the question of punishment.[54] Petitioner unsurprisingly characterizes that standard as inadequate, an interesting criticism which raises the question of the ability of this, or any, court to deal with what would appear to be the recurring question of adequacy of standards if petitioner's position in this case is sustained. Assuming *arguendo* that standards are required, let us examine the Ohio standard with a view to determining its adequacy.

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53. Perhaps no discussion of the Court's view of the law in this area is complete without reference to footnote 8 in *Giaccio, supra*:

> "In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many states to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits."

See also *Winston v. U. S.*, 172 U. S. 510 (1899).

54. Brief of petitioner, James Edward Crampton, page 20.

The Ohio standard is exemplified in the holding of *Howell v. State,* 102 Ohio St. 411, 131 N. E. 706 (1921), as interpreted in *State v. Caldwell,* 135 Ohio St. 424, 21 N.E. 2d 343 (1939), and what has been described as the Howell-Caldwell charge to Ohio capital case juries:

> "(If you find the defendant guilty of first degree murder) then you will have one further duty to perform, and that is, you will determine whether or not you will extend or withhold mercy. . . .In that connection whether you recommend or withhold mercy is a matter solely within your discretion calling for the exercise of your very best and most profound judgment, not motivated by considerations of sympathy or as a means of escaping hard or disagreeable duty, but must be considered by you in the light of all the circumstances of the case with respect to the evidence submitted to you and the other circumstances surrounding this defendant."[55]

If we may describe the Ohio rule as articulating a standard of evidence in the case, it would appear that such a standard would conform with the requirements of Due Process and Equal Protection, inasmuch as it limits the jury to a consideration of the duly admitted evidence, which has, of course, been subject to the rules of admissibility and other Due Process guarantees in making its determination as to sentence. We submit that such a standard is thereby readily judgable by current Equal Protection and Due Process criteria.

A discussion of standards with reference to the points raised by petitioner leads to a further consideration. As-

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55. *State v. Caldwell,* 135 Ohio St. 424; 21 N. E. 2d 343 (1939).

suming again that standards are necessary by virtue of Fourteenth Amendment requirements, it is not unfair to ask: what kind of standards? Petitioner fails, somewhat mystifyingly, to specify the nature of the standards which should guide a jury in determining the question of punishment. Nevertheless, mention is made by amici of the standards suggested by the Model Penal Code.[56] As this court is well aware, the Model Penal Code contemplates a separate penalty phase of the trial if the trial court does not impose a sentence of felony of the first degree, which it must do if it is satisfied that any of several mitigating circumstances exist. The death penalty may be imposed in the second stage of the proceeding in the discretion of the court. The Code provides that such discretion shall be exercised taking into account the aggravating and miti-

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56. *American Law Institute, Model Penal Code,* §201.6 (Tentative Draft No. 9, 1959); See also brief of amici, page 9.

gating circumstances enumerated in the code.[57]

The aggravating circumstances proposed by the Model Penal Code are embodied in many instances in existing state statutes.[58] Their applicability as standards is therefore operative in some jurisdictions, although usually in the form of separately defined crimes. Perhaps the most interesting of the proposed aggravating circumstances in the Model Penal Code is the last mentioned: "that the murder was especially heinous, atrocious, or cruel, mani-

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57. The aggravating circumstances are these:

"(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(c) At the time the murder was committed, the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, or kidnapping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for pecuniary gain.

(h) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity."

58. *Ohio Revised Code, Section* 2901.01; *Connecticut Gen. Stat.* §53-10; *Georgia Code Ann.* §26-1101, *Ga. Laws 1970,* No. 1333; *N.Y. Penal Law* §125.30 and §125.35; *Texas Code Crim. P. Ann.* art. 37.07 (2) (b).

festing exceptional depravity."[49] It is further respectfully submitted that this language approaches very closely the Ohio "standard" of limiting the jury to a consideration of the evidence in the case in exercising its discretion with reference to whether or not capital punishment shall be imposed. Such a finding would obviously depend on the exercise of "discretion" by the sentencing judge in reviewing the evidence. The necessity of exercising a great deal of discretion would still remain if all of the mitigating and aggravating circumstances suggested by the Model Penal Code were applied in the determination by the court as to whether capital punishment should be imposed in a proper case. Even opponents of capital punishment, while arguing as petitioner does here that the absence of standards in jury deliberations violates due process, admit that

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[49] *American Law Institute, Model Penal Code,* §201.6 (Tentative Draft No. 9, 1959).

the imposition of standards is no solution.[69]

It appears therefore that petitioner and amici are seeking the elimination of the death penalty by collaterally attacking the method of its administration and imposition. Thus, the real argument appears to be that the death penalty should be eliminated because it is an absolute punishment and no system of justice dependent upon human beings for its administration will ever be able to reach a state of absolute certainty. It is not unfair to say that the attack on the death penalty presented in this case is

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69. See *Comment "The Death Penalty Cases"*, 56 Cal. L. Rev., 1268, 1270, 1489 (1968), described by the editors as ". . .what may be the most ambitious student piece ever published in the review", wherein an eloquent argument is made for the abolition of the death penalty. The article was originally submitted as an amicus brief to the California Supreme Court in *In re Anderson*, 69 Cal. 2d 613 (1968), and subsequently modified after the decision of this Court in *Witherspoon v. Illinois*, 391 U. S. 510 (1968). It assigns several grounds as reasons for elimination of the death penalty:

1. The death penalty is incompatible with the Fifth Amendment guarantee of a fair trial.

2. The death penalty is cruel and unusual within the meaning of the Eighth Amendment.

3. The lack of standards in jury deliberations violates "due process."

4. The exclusion of jurors opposed to capital punishment violates Sixth Amendment right to a fair trial.

5. The entire judicial process in capital cases guarantees a constitutionally inadequate result.

The authors note in summary that their paper "concludes that California's failure to provide penalty juries with standards to guide life or death decisions violates due process. This lack of standards assures an aribtrary selection of defendants who will die. *But arbitrariness cannot be cured by penalty trial standards. . .*" (Emphasis Ours.)

honorably brought but belongs in the legislative arena. The decisions of this Court in the recent cases cited above[61] and in such cases as *Trop v. Dulles*, 356 U.S. 86 (1958), lead to the inescapable conclusion that this Court is not willing to declare the death penalty cruel and unusual punishment within the meaning of the Eighth Amendment, and that attempts to modify its administration or eliminate it altogether must be considered determinations of social and public policy for which legislative means exist. Fundamental changes such as the elimination of the death penalty must properly be pursued in that arena. It can hardly be argued that such attempts are foredoomed in view of recent developments in a number of American jurisdictions.[62]

It is interesting to note the fundamental contradiction in the arguments presented in this case in support of petitioner's position. It is argued that "enlightened public opinion" no longer tolerates the wholesale imposition of the death

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61. See *Williams v. Florida*, *Witherspoon v. Illinois*, and *Spencer v. Texas*, supra.

62. The following states now impose a maximum punishment of life imprisonment for murder:

Alaska (Alaska Stat., §11.15.010, §11.15.020)
Iowa (Iowa Code Ann., §690.2)
Maine (Me. Rev. Stat. Ann., title 17, §2651)
Michigan (Mich. Comp. Laws, §750.316)
Minnesota (Minn. Stat. Ann., §609.185)
Oregon (Ore. Rev. Stat., §163.010)
West Virginia (W. Va. Code, §61-2-2)
Wisconsin (Wis. Stat. Ann., §940.01)

penalty[63], on one hand, and on the other, it is presumed that juries, composed of representatives of the same public which holds the aforementioned enlightened opinion, are presumed to approach the question of the imposition of the death penalty "irrationally, arbitrarily and capriciously."[64] If juries represent the conscience of the community[65] and if that concept has any validity[66], then the argument that the existence or discretion presupposes the abuse thereof must fail.

Perhaps the real conflict in this case is between the approaches to our Constitution which often generate vehement dissenting opinions in the cases decided by this court. We must then ask whether the issues in this case should be decided by taking into consideration the plain meaning of the words of our Constitution and its Amendments as understood in the context of the historical development of our jurisprudence; or whether the concepts developed in the decisions of this court, founded on the personal rights guaranteed by the first ten Amendements to the Constitution as incorporated into the Fourteenth Amendment and applied thereby to the several states, need not be delimited by consideration for the attempts of the legislative branch to effectuate the exercise of those rights within an ordered system.

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63 See brief of amici, page 10.

64 See brief of petitioner James Edward Crampton, page 31; brief of amici page 67.

65 *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

66 See *Duncan v. Louisiana*, 391 U.S. 145, 151 to 158 (1968) and *Williams v. Florida*, 399 U. S. 78 (1970).

There is no better statements of the conclusion which we urge upon the Court than the following language from the Tenth Circuit Court of Appeals in *Sequra v. Patterson*, 402 F. 2d 249 (1968), referring to the decision of this Court in *Witherspoon* and quoting it with respect to the function of a jury in determining the penalty in a First Degree Murder case, the Court notes that it has discovered no successful attacks upon the discretion allowed the jury, and says:

> "Perhaps this is because it is neither desirable nor feasible to postulate a specific standard to so control the jury. It is axiomatic that the line between contemporary community values and the penal system is filled by the jury's being allowed to be reflective of prevailing social thoughts. To assert that the adoption of rigid guidelines seeking to control the jury in this respect, thereby substituting merciless standards for present day flexibility, is compelled by due process is clearly untenable."

CONCLUSION

NEITHER THE UNITARY TRIAL NOR DISCRETIONARY CAPITAL JURY SENTENCING VIOLATE THE CONSTITUTIONAL RIGHTS OF DEFENDANTS. THE CONCEPTS OF DUE PROCESS AND EQUAL PROTECTION ARE NOT SO OPPRESSIVE AS TO PRECLUDE PRESENT OHIO LAW AND PRACTICE. THERE HAS BEEN NO SHOWING THAT JAMES EDWARD CRAMPTON'S CONSTITUTIONAL RIGHTS WERE NOT SCRUPULOUSLY PROTECTED. WE, THEREFORE, URGE THE AFFIRMANCE OF THE

JUDGMENT OF THE SUPREME COURT OF OHIO UPHOLDING THE CONVICTION OF PETITIONER AND THE PENALTY IMPOSED UPON HIM.

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